unless reconsidered 597

No. 670

APR 2 1954

HAROLD B. WILLEY, C

IN THE

# Supreme Court of the United States

October Term, 1953

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AEROVOX CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Aerovox Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on January 28, 1954.

### OPINIONS BELOW

The original decision and order of the National Labor Relations Board (R. 72) are reported at 102 NLRB 1526 and its supplemental decision and order (R. 81) are reported at 104 NLRB No. 40. The opinion of the Court of Appeals (R. 331) is not yet reported.

## JURISDICTION

The judgment and the decree of the Court of Appeals were entered on January 28, 1954, and March 2, 1954, respectively (R. 341, 342). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and under Section 10(e) of the National Labor Relations Act, as amended.

## QUESTIONS PRESENTED

1. Whether the Court below properly held that the National Labor Relations Board lacks power to investigate and determine the truth or falsity of non-Communist affidavits filed with it despite the fact that it has serious reason to believe the affidavits are false and that the purposes of Section 9(h) of the Act are being thwarted and its own processes abused.

2. Whether, in view of the uncontroverted evidence as to Petitioner's relations with a labor organization of its employees, the court below erred in affirming the Board's findings that Petitioner had dominated, supported, and interfered with, the organization.

## STATUTE INVOLVED

The pertinent portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 151, *et seq.*) are set forth in the Appendix, *Infra*, pp. 21, 22.

## STATEMENT

Petitioner is a Massachusetts corporation which is engaged in the manufacture and sale of capacitors. A complaint that Petitioner had engaged in unfair labor practices was issued February 14, 1952, by the National Labor Relations Board. The complaint was based upon charges filed by United Electrical, Radio and Machine Workers of America (UE) and International Union of Electrical, Radio and Machine Workers, C.I.O. The charges filed by UE were to the effect that Petitioner had discriminatorily

decreased the pay of, and subsequently discharged, one Manuel Cordeiro in order to discourage membership in UE, and had dominated, contributed support to, and interfered with a labor organization of its employees known as the Aerovox Plant Committee (R. 20-22). The charge which was filed by the C.I.O. union related only to Petitioner's alleged domination and support of the Aerovox Plant Committee (R. 23).

The Trial Examiner held that, except for the allegation as to Cordeiro's reduction in pay, the charges had been sustained. He concluded, therefore, that Petitioner had violated Sections 8 (a) (1), (2), and (3) of the Act, *infra*, p. 21. In its Exceptions to the Intermediate Report of the Trial Examiner, Petitioner moved to dismiss the complaint on the ground, *inter alia*, that the non-Communist affidavits which had been filed with the Board by the officers of UE pursuant to Section 9(h) of the Act were false since the officers were then members of the Communist Party. Petitioner contended that the Board's processes were wrongly used by UE and, therefore, there was no proper statutory foundation for the complaint.

The Board denied the motion stating: "As under the terms of a recent court decision [citing *United Electrical Workers* v. *Herzog*, 110 F. Supp. 220 (D.C.D.C.)] we have no authority to require affirmance of the truth of the affidavits filed with the Board, we deny the Respondent's motion to dismiss the complaint on the ground of non-compliance by the UE" (R. 82). Having agreed with the Trial Examiner's finding that Cordeiro had been discriminatorily discharged and that Petitioner had dominated, contributed support to, and interfered with, the administration of the Aerovox Plant Committee, the Board ordered the Petitioner to cease and desist from such practices, take certain affirmative action, and post appropriate notices (R. 77-79).

The United States Court of Appeals for the District of Columbia Circuit, Judge Wilbur K. Miller dissenting, affirmed the order of the Board as being supported by sufficient evidence. Petitioner's contention that the Board had erred in holding that it was completely foreclosed from inquiring into the truth or falsity of the non-Communist affidavits filed with it was rejected by the Court solely in reliance on its previous decision in *Farmer et al.* v. *United Electrical, Radio and Machine Workers of America (UE)*, decided December 4, 1953. The cited case is now pending before this Court (No. 597) on petition of the Government for a writ of certiorari.

The evidence which the court below found sufficient to support the Board's finding that Petitioner had dominated, supported, and interfered with a labor organization of its employees may be summarized as follows:

In 1941 Petitioner was engaged in defense work (R. 144). In order to prevent losses from fire and to guard against espionage and sabotage, Petitioner's employees, at the suggestion of a representative of the Navy Department formed a National Defense Committee composed of representatives selected by each of the departments in Petitioner's plant (R. 144-147). The Committee met periodically with management to discuss fire and sabotage prevention and other defense problems (R. 144, 145, 234, 235). Gradually the periodic discussions with management turned to other matters, and by 1943 or 1944, such subjects as increased wages, rest periods, cafeterias for employees and the adjustment of grievances predominated over defense problems (R. 145-148, 180, 181, 235). The National Defense Committee became known as the Aerovox Plant Committee (R. 147). It has been in continuous existence since then and has been recognized and dealt with by Petitioner as the bargaining representative for its production and shop clerical employees on all matters appropriately the subject of collective bargaining (R. 114, 142, 147-149, 154-155, 161-162).

The Plant Committee has never adopted any constitution, by-laws or other written document defining its functions, duties or modes of operation (R. 147-149, 161, 201, 202). It has operated by custom in an informal manner (R. 148, 149). Elections of members of the Committee were held on company property during rest periods and were conducted by fellow employees (R. 183, 184, 186). Ballots consisting of scraps of paper on which employees wrote the names of their candidates were distributed, collected and counted in each department during the morning rest period, and a run-off election in similar fashion was held during the afternoon rest period (R. 182-184).

The representatives chosen in each of the several departments constituted the Aerovox Plant Committee. The only function of the Committee was to meet periodically with management, usually each Wednesday, in order to discuss subjects of mutual concern, such as wages, rest periods, parking problems, etc. Each member of the Committee presented to management the problems which occurred to him or which he had been asked to present by a coworker in his department. In general, each representative elicited informally the opinions of his constituents and acted in accordance with the consensus in his particular department (R. 179-181, 187-189, 205, 206, 209, 213, 214, 218, 219, 223, 224). The Committee members did not hold any caucuses in advance of the weekly meetings with management in order to formulate unified demands. However, in addition to informal consultation with constituents, the Committee occasionally interrupted its meetings with representatives of management to ask the latter to step outside so that the Committee could determine the group position (R. 152, 180, 222-226, 256, 257).

Committee representatives were paid their regular rate of pay for time spent at the meetings (R. 150, 161, 202, 203). The expenses of the Plant Committee were nil. In addition to the scratch-paper which was used as ballots once a year, and which, presumably, was taken from Peti-

tioner's stock, Petitioner permitted the secretary of its Personnel Director to prepare mimeographed notices specifying the exact date in October of each year selected by the Committee for holding Committee elections (R. 182-184, 163, 165). The use of Petitioner's bulletin board to post notices of election was also permitted. Moreover, the secretary, at the request of the Committee, was present at the weekly conferences between the Committee and Petitioner's representative and her transcribed minutes of the meetings were kept in her office (R. 159-160, 173, 175, 178, 222-225, 226, 240).

After the election of a new Committee each October, a Chairman and Vice-Chairman would be selected. The sole function of the Chairman was apparently to be the leader of the Committee at the weekly conferences with management and to direct the order in which the several members would present their problems or address the management representative (R. 252). The only evidence in the record as to Petitioner's participation in the selection of these Committee officials was the testimony of one witness who stated that someone had suggested after the October 1951 election that the selection of a Chairman be postponed for several weeks until the new members had an opportunity to become acquainted and that Petitioner's Personnel Director had indicated his agreement with the decision (R. 198).

Prior to the October 1951 election, the Committee was composed of 20 members, who were elected from nine voting units. Due to the large increase in the number of company employees, it was decided in September 1951 that the Committee should be enlarged (R. 149, 150). Although the suggestion for an increase in membership did not originate with the Personnel Director, he was present when the matter was discussed and supplied the Committee with a list of the company's employees broken down by departments. Each individual member of the Committee made his own decision as to whether or not an increase in the number

of representatives for his department was desirable. As a result 35 employee representatives were elected to the Committee in October, 1951 (R. 165, 166, 191-196, 240-244).

Pursuant to the direction of the Board in a representation case initiated by the CIO union, an election to determine a bargaining representative was conducted on October 25, 1951, among Petitioner's production employees. (R. 31) The employees had the choice of IUE-CIO, UE, International Brotherhood of Electrical Workers, AFL, or none of them. The tally of ballots cast at the election disclosed that the combined vote for all the unions was less than 30% of all the ballots cast. A substantial majority of the employees voted against representation by any of the three participating labor organizations (R. 12, 13), and thereby expressed their preference for the Plant Committee as their labor organization.

On the basis of these facts, the Board found that Petitioner had dominated, interfered with, and supported the Plant Committee in violation of Sections 8(a) (2) and (1) of the Act. The Court of Appeals, one judge dissenting, held the evidence sufficient to support the Board's conclusions.

## SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, despite the existence of grave doubt on the part of the Board as to the genuineness of the affidavits filed by UE officers pursuant to Section 9(h) of the Act, the Board was without power to take any administrative action to assure itself that the objectives of Section 9(h) and the integrity of its processes had not been abused.

2. In failing to remand the case to the Board (a) to exercise its administrative discretion as to whether or not to conduct an inquiry into the truth or falsity of the affidavits filed with it and (b) to determine whether, absent compliance by the UE, an adequate statutory foundation had

been laid for the complaint which was issued against Petitioner.

3. In holding that the Board's decision that Petitioner dominated, supported and interfered with the Aerovox Plant Committee was supported by substantial evidence.

## REASONS FOR GRANTING THE WRIT

### I.

Section 9(h) of the Act [1], in substance, forbids the Board to entertain complaints based on charges filed by a union unless each officer of that union files with the Board annually an affidavit stating that he is not a member of or affiliated with the Communist Party, and that he does not believe in, is not a member of, and does not support, any organization that believes in or teaches the overthrow of the Government by force or by illegal and unconstitutional methods. The decision of the court below that the National Labor Relations Board lacked power to inquire into the truth of such non-Communist affidavits was based solely upon its earlier decision in *Farmer et al.* v. *United Electrical, Radio and Machine Workers of America* (*UE*), of which the Government itself now seeks review in this Court (No. 597, this Term).

The very same union, and the identical factual basis for the Board's doubts as to the truth of the non-Communist affidavits, are present in both cases.

The arguments advanced by the Government in support of its petition for certiorari in the *UE* case apply with equal force to the instant petition. As the Government pointed out (Petition for Certiorari, No. 597, p. 11): "It is patent that the question decided by the court below is, in the light of the Congressional objective, of major importance in the administration of the Act. Furthermore, since, as we view it, the decision below substantially

[1] 29 U.S.C., Supp. V. Sec. 159(h).

thwarts the Congressional purpose of removing Communist influence from the American labor movement, it is desirable that Congress know the limits of the Board's power under Section 9(h) in order to determine whether additional legislation is necessary to reach the evil which Congress has sought to eradicate. Hence, we submit, the decision below clearly warrants review by this court."

In *American Communications Association* v. *Douds,* 339 U.S. 382, 388, this Court stated that the purpose of Section 9(h) of the Act was to prevent the disruptive effects upon our national economy resulting from political strikes by removing from office, ". . . Communist leaders of labor unions [who] had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government". The point stressed by this Court was that Congress intended such leaders to be removed from the positions of great power which they wielded over our economy. It approved the dictate of Congress that any labor leader who embraces the philosophy of the Communist Party should be prevented from retaining an influential position as long as he adheres to his dangerous beliefs. Despite this approved Congressional policy the court below held that even if the Board has strong reasons to believe that union leaders are in fact members of the Communist Party at the time they file the affidavits under Section 9(h) it is powerless to prevent them from using its processes.

Petitioner contends, for essentially the same reasons urged by the Government in its Petition for Certiorari in No. 597—and which, therefore, need not be repeated here except in summary—that the Court below has misconceived the purpose of Section 9(h) of the Act. "For, if the Board must accept such affidavits at face value, despite the fact that their truth or validity has been put in doubt, the result is that Communist union leaders, through the mere expedient of filing a false affidavit, may flout not only the

objectives of Section 9(h) but also abuse the integrity of the Board's process—a result which we believe to be at war with the basic Congressional purpose." (Petition for Certiorari, No. 597, pp. 9-10).

The stand which the Government has taken in this Court in the *UE* case, is of course, diametrically opposed to the position which the Board took in denying Petitioner's motion to dismiss the complaint in the instant case, when, in reliance on the district court decision in the *UE* case, the Board held that it had "no authority to require affirmance of the truth of the affidavits filed with the Board . . ." (R. 82).

It is important to emphasize that Petitioner is not suggesting that the court below should have required the Board to prove by affirmative evidence that UE complied with Section 9(h) of the Act. We recognize that no such absolute statutory duty has been imposed on the Board. Our point simply is that when matters which raise doubts as to the charging union's compliance with Section 9(h) were within the Board's own knowledge and were called to its attention in Petitioner's motion to dismiss, it was the Board's duty at least to determine, in the exercise of a sound administrative discretion, whether the Section 9(h) affidavit was genuine or whether it was spurious and fraudulently used by UE to invoke the Board's processes contrary to the Congressional mandate. It should be noted that the Board's denial of Petitioner's motion was based not upon an exercise of its administrative discretion but upon its supposed lack of power. Petitioner respectfully submits that this Court should assure the Board that it has the requisite power to protect itself against abuses of its own processes.[2]

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[2] It may be noted that the decision below is in conflict with the views expressed by the United States Court of Appeals for the Tenth Circuit in *National Labor Relations Board* v. *Fulton Bag and Cotton Mills*, 180 F. 2d 68, 71, and for the Sixth Circuit in *National Labor Relations Board* v. *Sharples Chemicals, Inc.* decided

If, as we contend, the Board had the requisite authority to inquire into the truth or falsity of non-Communist affidavits filed with it, it is clear that the court below erred in failing to remand the instant case to the Board. UE was the sole charging union in respect of the allegation that Petitioner had discriminatorily discharged Cordeiro in violation of Section 8(a) (1) and (3) of the Act. Thus, in the absence of compliance by UE with Section 9(h), that part of the complaint, and hence of the Board's decision, which related to the discriminatory discharge had absolutely no statutory foundation. (Sections 9(h), 10(b), *infra*, pp. 21, 22, *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U.S. 322; cf. *National Labor Relations Board* v. *Dant*, 344 U.S. 375.) Furthermore, although a charge that Petitioner dominated the Aerovox Plant Committee was filed by the C.I.O. union as well as by UE, the periods covered by the two charges were somewhat different. UE contended that the domination had occurred during a period beginning May 30, 1951 whereas the C.I.O. union contended it had existed during the period beginning July 1, 1951. The Board's decision is not explicit on the point—and we do not think the Court should be asked to infer—that the Board's finding of domination covered the period after July 1, 1951 as well as that between May 30, 1951 and July 1, 1951. Therefore, upon remand of this case, the finding of illegal domination as well as the finding of discriminatory discharge should be deemed within the compass of the Board's reconsideration. [3]

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January 27, 1954, 33 LRRM 2438. The holding in the latter case was to the effect that the Board is not *required* to permit private parties to Board proceedings to litigate compliance issues in such proceedings. The court stated, however, that the statutory scheme reserves to the Board the administrative function of "satisfy [ing] itself that a charging union has complied". The latter statement is irreconcilable with the decision below in the instant case.

[3] The C.I.O. union's charge was filed on December 27, 1951 (R. 23-24). The Board was barred under Section 10(b) of the Act from enlarging or adding to the language of that charge so as

The Board conceded in the court below that if its authority to inquire into the truth of the UE affidavits was upheld, the case should be remanded to it. It asked that the scope of the inquiry be kept sufficiently broad to include a determination as to whether or not its entire decision might not be based on the C.I.O. union's charge, but, as the Board fairly pointed out in its brief below (p. 47), "These questions should be determined by the Board in the first instance."

## II.

In addition to the issue in respect of the non-Communist affidavits, Petitioner seeks review in this Court of that part of the decision below which affirmed the Board's finding that Petitioner dominated, supported, and interfered with a labor organization of its employees. We are mindful of the principle (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491) that "This Court will intervene only in what ought to be the rare instance when the standard [of substantial evidence] appears to have been misapprehended or grossly misapplied." We submit that this case does, indeed, present such an instance. If the decision below is allowed to stand, the statutory requirement of substantial evidence to uphold an order of the Board will be severely eroded.

Although the court below was careful to eschew any aim of "forbidding any organization or type of organization which the employees of Aerovox Corporation by their own undominated and uninfluenced wish may choose to form and designate as their representative" (R. 339), its actual decision negates those words. The holding that the Plant Committee must be disestablished makes it difficult, if not impossible, for any loose-knit, informal, unaffiliated labor organization to exist. The trivial and incidental cooperation between Petitioner and its employees (which was in-

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to include an allegation of domination by Petitioner during a period more than 6 months prior to the filing and serving of the charge.

flated into a finding of domination, interference, and support) is inherent in, and a necessary concomitant of, an amicable employer-employee relationship. Basically, Petitioner's only "fault" was its acquiescence in, and recognition of, its employees' own choice of an "inside" labor organization which did not have the formal organizational attributes of an affiliated union.

It must be emphasized that this is not a case in which an employer instigated or actively participated in the formation of a union in order to prevent an outside union from coming into the plant. Petitioner's contacts with the Plant Committee were the natural outgrowth of a relationship that began in 1941 with the creation by the employees of the National Defense Committee. It was natural that under such circumstances no elaborate or formal labor organization was established. But, as the Board itself has repeatedly recognized, (see, e.g., *Commonwealth Plastic Co.*, 34 N.L.R.B. 1129), there is nothing in Section 2(5) of the Act, which defines a labor organization, that requires it to have a constitution, by-laws, dues, or treasury in order to qualify as a "labor organization" within the meaning of the Act. Those factors not being required by law, their absence has no probative value to show company domination or interference. Moreover, the fact that the Plant Committee did not see fit to adopt a constitution or by-laws or to collect dues is in no way attributable to any action on the part of Petitioner. Petitioner had the right, and, indeed, the duty, to meet and bargain with the Plant Committee regardless of the lack of a written constitution or by-laws or a provision for dues.

The history of the Plant Committee is significant in our view because in the context of that history the services which were furnished to the Committee and the informality of its procedures were innocuous. No invidious inferences should properly be drawn from those factors. They were not part of a program of support or domination; they were not forced upon the employees in any way to subvert their

freedom of choice or to prevent them from selecting another organization to represent their interests. It is noteworthy that the Board did not find that Petitioner had engaged in *any* conduct which constituted an independent Section 8 (a) (1) violation, as, for example, surveillance of union activities, threats of loss of privileges, etc. The only basis for the finding of interference and coercion was that which the Board inferred to be implicit in the fact that the Petitioner permitted certain facilities to be used by the Plant Committee in connection with internal Committee affairs, and that representatives of management were sometimes present when such affairs were discussed.

The decision of the court below does not recite which facts it found sufficient to constitute substantial evidence in support of the Board's finding of domination. However, the basis of the Board's finding is contained in the following extract from its decision (R. 74-75):

> "This finding of the Trial Examiner is based, among other things, on the facts that the Respondent's personnel manager, Mohel, attended all meetings of the Committee, and that employees attending were paid by the Respondent for the time they lost from work because of such attendance. The Respondent, however, claims that meetings of the Committee were negotiation and grievance sessions which the Respondent's representatives had to attend and for which it could legally compensate its employees. While an employer may, without violating the Act, meet with its employees on its property to negotiate agreements and to settle grievances, and while it may compensate employees for time spent on these matters,[4] the record shows that the meetings of the Committee went beyond this scope. All meetings of the Committee were conducted on the Respondent's time and property in the presence of representatives of management. Considerable time at these meetings was devoted to discussion of such matters of internal Committee management as holding elections for Committee members, election of Committee officers, and determination of the number of em-

ployees to serve on the Committee. We therefore find that the Respondent, by attending these meetings and by permitting the use of its facilities for these discussions, dominated and interfered with the administration of the Committee[5], and contributed financial support to it, in violation of Section 8(a)(2) and (1) of the Act."

[4] Section 8(a)(2) of the Act as amended; Remington Rand Arms Company, Inc. 62 NLRB 611.

[5] Muriel H. Rehrig, d/b/a Rehrig Pacific Company, 99 NLRB No. 34."

Essentially, therefore, the conclusion that Petitioner had dominated, supported, and interfered with the Plant Committee rested solely on subsidiary findings that in the room which Petitioner provided for the purpose of bargaining conferences with its employees—a perfectly proper accommodation—a relatively few moments were used by the Committee, in and out of the presence of Petitioner's representatives, to discuss internal Committee affairs; that the secretary which Petitioner made available for the bargaining conferences was allowed, at the Committee's request, to include in her notes the very incidental discussions of internal Committee affairs; and that Petitioner permitted the Committee to use its mimeograph machine and scratch-paper in connection with the election of representatives. It is undisputed that the Committee members were paid only their regular rates of pay when they conferred with management. The Board itself recognized that under Section 8(a)(2) of the Act an employer may compensate employees for time spent on these matters. Petitioner's apparent failure to deduct part of the wages for those relatively few moments during which internal Committee affairs were discussed was seized upon by the Board as an indication of Company support. It may be that in a limited, technical sense the furnishing of the few services which were involved here and the failure of Petitioner to make

a slight deduction from wages is "financial or other support," but we submit that they were so trivial and so incidental as to come within the *de minimis* principle. If courts of appeals are to feel bound to consider such *minutiae* as the equivalent of "substantial evidence" of domination and support, harmonious relationships between employer and employees in plants throughout the country will be jeopardized.

The Board's premise (R. 74) that "All meetings of the Committee were conducted on the . . . [Petitioner's] time and property in the presence of representatives of management," even if valid, falls far short of supporting the conclusion that Petitioner interfered with internal Committee affairs. Nowhere in the record is there the slightest indication that Petitioner *required* such meetings to be held on its property, attached any condition to the use of its facilities, or gave any inducements or concessions to the Plant Committee to refrain from holding meetings off the property or out of the presence of Petitioner's representatives. It is beyond dispute that the meetings at which management was present were concerned almost exclusively with discussions and negotiations of grievances and wage increases. At no time did Petitioner tell the Committee what position it should take at such conferences or dictate how the committee should conduct its own affairs. The matters of internal Committee management which were discussed in the presence of Petitioner's representatives were insignificant in view of the nature of the organization. They were inflated by the Board far beyond their real worth when considered in the light of the Committee's origin and history.

The Board's refusal, prior to the Taft-Hartley Act, to permit an employer to provide incidental services for an inside union despite its approval when such services were furnished an affiliated union, gave rise to a Congressional declaration that equal treatment must be the rule. In House Conference Report No. 510, 80th Congress, 1st Session, re-

lating to the 1947 Amendments (commonly known as the Taft-Hartley Act) it was noted (pp. 54, 55) that,

> "In the past the Board has made findings of violation of Section 8(2) in cases involving independent unions, committees and representation plans upon much weaker evidence than it has required in cases involving affiliated unions, and it has ordered employers to take far more drastic action with respect to independent organizations than with respect to affiliated organizations . . . "

The Conference Report also stated (p. 40) that the Board has

> "in the case of affiliated unions permitted employers to provide bulletin boards in their plants for the union's use, to give union officials preferred treatment in laying off workers and calling them back, and to allow shop stewards without losing pay to confer not only with the employer but with the employees as well, and to transact other union business in the plant. The Board has not permitted the employer to do the same things for unaffiliated unions, and it was the purpose of the House provisions to provide for equality of treatment in this respect."

Section 10(c)[4] of the Act was designed to effectuate that purpose. Congress provided that:

> ". . . in determining whether a complaint shall issue alleging a violation of Section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope."

The legislative history of the Taft-Hartley Act shows that this section and Section 9(c)(2) of the Act[5] were in-

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[4] 29 U.S.C., Supp. V, Sec. 160 (c).

[5] "In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing

tended as a "limitation on the power of the Board in holding activities to be unfair labor practices under Section 8(a)(2)."[6]

We submit that the Board and the court below failed to give heed to this admonition of Congress. They drew inferences of domination and support from Petitioner's relationship to the Committee which could not conceivably have been drawn if the Committee had been an affiliated union. The decision below, in equating Petitioner's mere acquiescence in the loose type of organization chosen by its employees with proscribed domination and support is, we submit, in conflict with the spirit of such decisions as *National Labor Relations Board* v. *Swank Products*, 108 F. 2d 872 (C.A. 3); and *Wayside Press* v. *National Labor Relations Board*, 206 F. 2d 862 (C.A. 9).

In the *Swank Products* case the Third Circuit said (p. 874):

> "The Act does not purport to prohibit plant, or so-called 'company' unions, except when they are linked to the employer. That relationship does not arise from passive acquiescence of an employer, for acquiescence has none of the positive and aggressive quality contemplated by such words as 'interfere', 'restrain', 'coerce', and 'dominate', which we find in the Act."

In the *Wayside Press* case, the Ninth Circuit stated (p. 866):

> "It was not the purpose of the Wagner Act and it is not that of the Taft-Hartley Act to encourage hostility between employer and employee. Nor were they designed to aid international unions in their conflicts with independent unions . . . Here the facts disclose

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the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of any order with respect to such labor organization or its predecessor not issued in conformity with Section 10(c)." 29 U.S.C., Supp. V, Sec. 159(c)(2).

[6] H. Rept. No. 510, 80th Cong., 1st Sess., p. 40.

exactly the relationship between the employer and employee which businessmen and workers should seek, the workers organized for the protection of their rights and still on a friendly contact with their employer."

In *National Labor Relations Board* v. *Valentine Sugars, Inc.* decided March 5, 1954, 33 L.R.R.M. 2679, the United States Court of Appeals for the Fifth Circuit reached a contrary result from that of the court below on a very similar factual situation. Indeed, the incidental facilities and assistance which the employer admittedly furnished the labor organization in the *Valentine Sugars* case appear much more extensive than those which Petitioner was found to have provided for its employees. Nevertheless, contrary to the decision below, the Fifth Circuit rejected the Board's conclusion that because of such acts of cooperation and assistance the employer had supported and interfered with the administration of a labor organization. As the court stated: "The precise section in question here was not enacted to prohibit or penalize courteous and friendly, or even generous, actions on the part of employers."

The instant case presents an important issue in current labor relations which necessitates drawing a line between legitimate acquiescence and friendly cooperation, on the one hand, and illegal domination and support, on the other. We submit that the views of this Court as to the proper application of the substantial evidence standard should be amplified by reference to the typical, recurring, factual situation which is involved here. This case offers a particularly suitable opportunity for the Court to furnish guideposts for the lower courts so that the paramount aim of the Act—freedom of choice on the part of employees—can be accommodated with the day-to-day realities of friendly cooperation between employer and employee in the common pursuit of industrial peace.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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April, 1954

## APPENDIX

The relevant portions of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 151 *et seq.*) are as follows:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8. (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

Section 8(c). The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Section 9(h). No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint

shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

Section 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint.

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## CITATIONS


Cases:

*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175 — 13

*National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498 — 13

*National Labor Relations Board* v. *Valentine Sugars, Inc.*, 33 L. R. R. M. 2679 — 13

*United Electrical Workers* v. *Herzog*, 110 F. Supp. 220, affirmed *sub nom. Farmer* v. *United Electrical Workers*, 33 L. R. R. M. 2196, certiorari denied, No. 597, April 12, 1954 — 11, 14

*Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474 — 13

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*):

Section 8 (a) (1) — 3, 9

Section 8 (a) (2) — 3, 9

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297697—54——1

# In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 670

AEROVOX CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the court below (R. 338–340) is not yet officially reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 72–79, 31–52) are reported at 102 N. L. R. B. 1526. The Board's Supplemental Decision and Order (R. 81–85), denying petitioner's motion for reconsideration and for a stay of the Board's order, is reported at 104 N. L. R. B. No. 40.

## JURISDICTION

The decree of the court below was entered on March 2, 1954 (R. 342–345). The petition for a writ of certiorari was filed on April 2, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

## QUESTIONS PRESENTED

1. Whether substantial evidence on the record considered as a whole supports the Board's finding that petitioner violated Section 8 (a) (2) and (1) of the Act by dominating, contributing support to, and interfering with the administration of the Aerovox Plant Committee.

2. Whether the Board is without power to take administrative action to determine the sufficiency of compliance of a labor organization under Section 9 (h) of the Act where it has reason to believe that the affidavits filed by the officers of the organization pursuant to the requirements of that Section are fraudulent and designed to frustrate the statutory objectives and to abuse the Board's processes.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the petition, pp. 21–22.

## STATEMENT

Pursuant to the usual proceedings under Section 10 (c) of the Act, the Board found that petitioner had violated Section 8 (a) (2) and (1) of the Act by dominating, contributing support to, and interfering with the administration of a labor organization of its employees known as the Aerovox Plant Committee,[1] and had violated Section 8 (a) (3) and (1) of the Act by discriminatorily discharging Employee Manuel Cordeiro, Jr. Inasmuch as the substantiality of the evidence in support of the latter finding is not challenged here, we set forth only the essential facts relevant to the finding of unlawful domination, support, and interference.

### A. THE BOARD'S FINDINGS OF FACT

In 1941 various agencies of the Federal Government urged that petitioner adopt precautionary measures, in view of its performance of "defense work," to prevent espionage and sabotage (R. 34; 144–145, 178). Accordingly, peti-

[1] Charges in this regard were filed by United Electrical, Radio and Machine Workers of America (UE) and International Union of Electrical, Radio and Machine Workers of America, CIO. The UE charge, filed November 27, 1951, alleged unlawful domination, support and interference "since on or about May 31, 1951" (R. 21–22); the CIO charge, filed December 27, 1951, was substantially identical except that it alleged such unlawful conduct "since on or about July 1, 1951" (R. 23–24). The UE charge also averred that petitioner had discriminatorily discharged an employee (R. 21–22).

tioner organized a body in its plant, known as the National Defense Committee and composed of representatives elected by the employees in each department of its plant (R. 34; 145–147). At the outset, the Defense Committee devoted itself to safety measures (R. 34; 144–145). Gradually, however, the periodic discussions between the Defense Committee and management turned to matters of wages, grievances, and other terms and conditions of employment (R. 34; 145–146, 238). Due to this pronounced change in function, the Defense Committee became known in 1943 or 1944 as the Aerovox Plant Committee, and petitioner since that time has continuously recognized and dealt with the Plant Committee as exclusive bargaining representative of its production and shop clerical employees (R. 34; 114, 142, 146–149, 154–155, 161–162, 178, 181, 237–238).[2]

Members of the Plant Committee were employees who were elected annually in departmental elections (R. 34, 35; 109–110, 146, 163, 305–306). All matters pertaining to the elections, including notices, publicity, the conduct of the elections, preparation, distribution, and counting of the ballots, as well as favorable pre-election comments extolling the work of the Committee, were taken care of by petitioner's personnel di-

[2] Despite this bargaining history, the Plant Committee has no written contract and no constitution or bylaws; it collects no dues and has no treasurer (R. 34–35; 113–114, 148, 161, 201–202, 204, 207–208, 249–250).

rector, Hyman Mohel, or at his direction, and with the aid of petitioner's supervisory and plant clerical employees (R. 35; 110, 114, 133, 138, 146, 163–164, 170, 172–173, 183–186, 190, 226, 239, 245, 280–281). Office employees were excluded from membership by reason of a "custom" for which Personnel Director Mohel was admittedly "partly responsible" (R. 36; 154–155). Meetings of the Plant Committee, generally lasting 60 to 90 minutes, were held weekly, or oftener when necessary, in the plant, and members were paid for the time spent at the meetings (R. 36; 111, 113, 150–151, 176, 181–182).

Mohel dealt with the Plant Committee from its inception (R. 35; 146, 172, 176–178), was present at every Committee meeting (R. 36; 152–153, 188–189, 208–209), and frequently presided over the first meetings of newly-elected Plant Committees (R. 252, 184–187). When Mohel was absent from the plant, scheduled Committee meetings were cancelled (R. 153–154, 179, 189–190). It is undisputed that since October 1950 the Committee called no membership meetings of the employees, nor did it hold any "meeting of its own [to] decide what demands they should make of Mr. Mohel or the Company" (R. 36; 185, 189, 204). Secretarial services for the Committee were performed by Mohel's secretary who, though not a member of the Committee, kept the transcribed minutes of meetings in her office (R. 36; 159–160, 173, 175, 178, 221–222, 226, 240).

In the course of meetings held shortly before the 1951 Committee elections, Mohel either suggested or heartily endorsed an increase in the number of representatives on the Committee to reflect the increased working force (R. 35; 149–150, 165, 190–191). To this end Mohel prepared and "read off" to the Committee a list of the changes which he thought ought to be made in representation (R. 35; 190–192). An enlargement was adopted without a formal vote (R. 35; 162–163, 165, 193–194, 196, 285). Thereafter, Mohel prepared and posted election notices in the plant listing the departments entitled to representation and substantially changing the election methods followed in prior years though the record lacks any evidence that the Committee had authorized changes in this respect (R. 35–36; 163, 173, 182, 205–206). These notices appeared over Mohel's typewritten signature (R. 35–36; 245–246, 280–281, 306, 323–324).

In August and September 1951 Mohel and the Plant Committee discussed wage increases (R. 174). The Committee, at first unwilling to accept Mohel's offer of a 2.2 percent raise, urged that the matter be held in abeyance until December (R. 247–248, 335). Mohel promptly informed the Committee he "thought it would be foolish of them not to take what they could get, accept the cost of living plans which *we were going to put in effect*" (emphasis supplied) (R. 248). Although

no vote was taken, Mohel's offer was considered accepted at the Committee meeting of September 5 by reason of the fact that no objection was voiced by the Committee members "who could speak up" in a general discussion but were not called on individually to express their views (R. 212–213, 215–217, 249, 336).[3]

On October 25, about two weeks after the 1951 Plant Committee election, a National Labor Relation Board election was conducted at the plant to determine whether the employees desired representation by United Electrical, Radio and Machine Workers of America, by International Union of Electrical, Radio and Machine Workers of America, CIO, by International Brotherhood of Electrical Workers, AFL, or by none of them (R. 31). A directive regarding the forthcoming Board election, addressed "to all supervisory personnel," was issued by Mohel on October 9, advising that "the Company has the right to and will inform its employees why * * * it will be to their best interests to continue working under the leadership that has secured for them all the benefits they now have rather than entrust their future to one of those organizations that have suddenly developed an interest in them and their dues" (R. 166–167, 307). Shortly thereafter, a

[3] Following the meeting, two Committee members privately revealed their opposition to the proposed increase (R. 213).

3 by 5 foot placard containing a picture of the newly-elected 1951 Plant Committee and listing past Committee achievements under the heading—"Here's what *you've* achieved through *your* Plant Committee"—was prepared by petitioner and placed 25 or 30 feet from one of the main entrances to the plant (R. 168–170, 176, 203–204, G. C. Ex. 9). On October 16 a letter signed by W. M. Owen, petitioner's president, was sent to the homes of all known plant employees, stating, *inter alia,* that the question to be determined by the Board election was "whether you want one of three unions to represent you or whether you prefer to continue representing yourselves," and stressing various advantages obtained "through your own Plant Committee—*without dues—without assessments—without surrendering your independence*" (R. 167, 308–309). A second letter dated October 23, was similarly distributed and signed, and concluded by urging that employees "vote 'None' in tomorrow's election" (R. 168, 309–312).

Two days later a substantial majority of those who cast ballots in the Board election voted to be represented by none of the three participating labor organizations, and the Company thereafter continued to recognize and deal with the Plant Committee as the representative of its employees (R. 31, 34, 76).

### B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts the Board concluded (R. 37, 74–75) that petitioner had dominated, interfered with the administration of, and contributed financial and other support to the Aerovox Plant Committee, in violation of Section 8 (a) (2) and (1) of the Act by contributing meeting and secretarial services to the Committee, by attending, participating in, and presiding over meetings of the Committee, and by paying Committee members for attendance at all Committee meetings. In rejecting petitioner's contention that the meetings of the Committee were negotiation and grievance sessions which it had to attend and for which it could legally compensate its employees under Section 8 (a) (2), the Board further found (R. 74–75) that Committee meetings, all of which were conducted on company time and property in the presence of management representatives, "went beyond this scope" in that "considerable time at these meetings was devoted to discussion of such matters of internal Committee management as holding elections for Committee members, election of Committee officers, and determination of the number of employees to serve on the Committee."

The Board entered an order, customary in such cases, requiring petitioner (R. 77–79) to cease and desist from its unfair labor practices, to

withdraw recognition from and disestablish the Committee as a collective bargaining representative of its employees, and to post the usual notices.[4]

Following issuance of the Board's Decision and Order, petitioner filed a Motion for Reconsideration (R. 79–81) alleging, *inter alia,* that the Board had erred in failing to rule on its motion to dismiss the complaint because of alleged non-compliance by UE with the filing requirements of Section 9 (h) of the Act. Specifically, petitioner alleged before the Board, and offered to prove, that UE was Communist-dominated, that the non-Communist affidavits filed by its officers were false and constituted an abuse of the Board's processes, and that certain individuals who had not filed were officers of UE although not designated as such (R. 82, 54–55). The Board denied the Motion for Reconsideration in a Supplemental Decision and Order (R. 81–85). Addressing itself to the question whether all "officers" had filed the required affidavits, the Board held that under Section 102.13 (b) (3) of its Rules and Regulations only an individual holding a position designated as an "office" by a union's constitution and

[4] The Board also ordered petitioner to reinstate with back pay Employee Cordeiro whom the Board had found to have been discriminatorily discharged (R. 44–45, 76). See *supra,* p. 3. Petitioner does not challenge the propriety of the order in this respect except insofar as it urges that the Board should have dismissed the complaint by reason of the UE's alleged non-compliance with Section 9 (h) of the Act.

bylaws is an "officer" for purposes of compliance unless such designation has been omitted to evade or circumvent the filing requirements of the Act. No such showing having been made and no information having been furnished the Board to cause it to order a further investigation, the Board made an administrative finding "that all officers of [UE] have complied with the filing requirements of the Act" (R. 82). On the question of the truth of the affidavits which had been filed, the Board stated (R. 82):

> As under the terms of a recent court decision [citing *United Electrical Workers* v. *Herzog,* 110 F. Supp. 220 (D. D. C.)][5] we have no authority to require affirmance of the truth of the affidavits filed with the Board, we deny the [petitioner's] motion to dismiss the complaint on the ground of non-compliance by the UE.

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[5] In the cited case, decided January 27, 1953, the District Court for the District of Columbia ruled that "the Board does not have authority to inquire as to the truth or falsity of the affidavits" (110 F. Supp. at 221). Pursuant to this decision, the District Court enjoined the Board from requiring UE or any of its officers "to make or file any affidavits or questionnaires or statements other than the annual affidavits and financial statements required by Section 9 (f), (g) and (h) of the Act" and from declaring UE out of compliance for failure of UE or any of its officers to do so. The court below, on December 4, 1953, several months after the Board's decision in the instant case, affirmed the decision of the District Court *sub nom. Farmer* v. *United Electrical Workers*, 33 L. R. R. M. 2196, and a petition for writ of certiorari was denied by this Court on April 12, 1954 (No. 597).

### C. THE DECISION OF THE COURT BELOW

Characterizing the evidence in support of the Board's findings of domination and discriminatory discharge as "ample" (R. 339), the court below, one judge dissenting, denied the petition to review and set aside the Board's order and granted enforcement of that order (R. 338–340). In answer to petitioner's claim that UE had abused the Board's processes by filing false non-Communist affidavits and that the charges ought not to have been entertained, the court below merely stated that "That matter was decided adversely to [petitioner's] contention in *Farmer, et al.* v. *United Electrical, Radio & Machine Workers, et al.*" (R. 339. See also n. 5, *supra.*)

### ARGUMENT

1. The substantive question here presented, namely, the validity of the Board's finding that petitioner dominated, supported, and interfered with the administration of the Aerovox Plant Committee, is merely a routine factual issue of no intrinsic importance in the administration of the Act. Moreover, the evidence summarized above, pp. 3–8, as the court below correctly concluded, is more than adequate to support the findings of the Trial Examiner, who saw the witnesses and heard the testimony, and of the Board, which carefully reviewed the record. No exceptional circumstances are shown here to warrant depar-

ture from the well-settled principle that this Court does not normally undertake to assess the sufficiency of the evidence supporting Board findings, for that is a question which "Congress has placed in the keeping of the Courts of Appeals." *Universal Camera Corporation* v. *National Labor Relations Board,* 340 U. S. 474, 491; *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U. S. 498, 502–503.[6] And "granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178.

2. The second question presented, however, namely, the scope of the Board's administrative powers with respect to the determination of the sufficiency of compliance under Section 9 (h) of the Act, raises, in our view, an important issue. As petitioner correctly states (Pet. 8–12), that question, while it arises in different circum-

[6] Petitioner claims no direct conflict of decisions. The most petitioner asserts (Pet. 18, 19) is that the decision below is "in conflict *with the spirit* of such decisions as *National Labor Relations Board* v. *Swank Products,* 108 F. 2d 872 (C. A. 3); and *Wayside Press* v. *National Labor Relations Board,* 206 F. 2d 862 (C. A. 9)" (emphasis supplied); and that in *National Labor Relations Board* v. *Valentine Sugars, Inc.,* decided March 5, 1954, 33 LRRM 2679, "the United States Court of Appeals for the Fifth Circuit reached a contrary result from that of the court below *on a very similar factual situation*" (emphasis supplied.) The different results in the cited cases are attributable principally to differences in the particular facts presented.

stances, is the one raised in the Board's petition for a writ of certiorari in *Farmer et al.* v. *United Electrical, Radio & Machine Workers of America* (No. 597, this Term), which was denied by this Court on April 12, 1954. In the District Court proceedings in the cited case, on a suit for declaratory judgment and injunctive relief brought against the Board by the very union here involved, the UE, that court ruled that "the Board does not have authority to inquire as to the truth or falsity of the [Section 9 (h)] affidavits" (110 F. Supp. at 221) and issued an injunction precluding such inquiry which specifically applied to the UE. Accordingly, when in the instant case petitioner challenged the truth of the Section 9 (h) affidavits filed by the UE's officers and moved for dismissal of the proceeding on that ground, the Board, citing the District Court decision, denied the motion on the ground that under the terms of that decision, it had "no authority to require affirmance of the truth of the affidavits" for the purpose of determining the adequacy of UE's compliance (R. 82).

In the meantime, however, the Board was pressing in the United States Court of Appeals for the District of Columbia Circuit its appeal from the decision of the District Court which had the effect of enjoining an inquiry theretofore initiated into the validity of the affidavits filed by UE officers. Had such an inquiry been conducted and had it

resulted in a determination that the UE was not in compliance, the instant case as well as every other case before the Board in which the UE was the moving party would have been directly affected. However, on December 4, 1953, the court below affirmed the decision of the district court, and when petitioner in the instant case pressed its Section 9 (h) contention on its petition for review of the Board's order, the court also rejected that contention on the authority of the earlier case (R. 339).

With deference, we continue to believe, for the reasons urged in our petition for a writ of certiorari in No. 597, that the court below erred in holding that the Board lacks authority to inquire into the truth or falsity of Section 9 (h) affidavits, and that the court's holding in this regard presents a question of great importance in the administration of the Act. Our views in this respect have been fully set forth in our petition in No. 597. The instant petition, however, seems to us to present no considerations in support of certiorari on that question which were not presented to this Court in No. 597.

## CONCLUSION

We submit that the petition for certiorari should be denied insofar as it seeks review of the substantiality of the evidence in support of the Board's finding of unlawful domination, support

and interference. On the issue of the scope of the Board's administrative powers with respect to the determination of compliance under Section 9 (h), the Board's position has been fully set forth in its petition for a writ of certiorari in No. 597.

Respectfully submitted.

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